No. 12321-5

IN THE COURT OF APPEALS FOR THE
STATE OF WASHINGTON DIVISION II

MARY E. HARRIS

Respondent,

v.

SKI PARK FARMS, INC.

Appellant.

REPLY BRIEF OF APPELLANT

(Filed June 23, 1989)

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I. CLARIFICATION OF FACTS

Both parties already have submitted lengthy statements of facts in their primary briefs, and Ski Park does not want to overburden the court by adding to the volume of factual information in this reply brief. Therefore, Ski Park will rely upon the accuracy of its original statement of facts rather than engaging in a point-by-point response to Harris' counterstatement of facts. Because of the importance of understanding the layout of the property at issue, however, Ski Park is compelled to clarify Harris' characterization of the various parcels.

The map attached to Respondent's brief as Exhibit "A", together with Harris' statement of the facts, is extremely misleading. Essentially, Harris suggests that she acquired two large parcels of property that surround the railroad right of way (including the right of way property at issue in this case). An analysis of the property descriptions, however, discloses that Harris only acquired three small parcels and that the property she acquired does not even adjoin the disputed property.

The Parcel A described in the Winkelman deed consists of all property in a certain quarter lying southeast of South Prairie Creek and northwest of the South Prairie/ Carbon River County Road, except the railroad right of way. Apart from the right of way, the property consists of two small parcels – one .21 acres in size and one 1.3 acres. Only if Harris also owns the abandoned right of way (which is not at issue in this litigation) are the two small pieces of land joined into one large parcel, as depicted in Exhibit "A" to respondent's brief.

Similarly, the Parcel B described in the Winkelman deed consists of the property in a certain quarter southeast of SR 162 and northwest of the South Prairie/Carbon River County Road, except the railroad right of way. Once again, Exhibit "A" to respondent's brief suggests that Harris purchased a large parcel from Winkelman. Instead, apart from the right of way, Winkelman only acquired a small .6-acre parcel in the northeast corner of the section. Significantly, the right of way property that Harris now claims continues for another 3,000 feet (over one-half mile) to the southwest of Harris' property.

As stated above, Harris' title to the right of way is not disputed, at least in this litigation, in areas where Harris' property adjoins the right of way. The dispute involves the right of way property that extends far beyond Harris' property and has no connection with that property. A map that helps identify the various parcels at issue is attached as an exhibit to this reply brief.

II. ARGUMENT

A. THE SUMMARY JUDGMENT STANDARD OF REVIEW IS APPLICABLE TO THE TRIAL COURT'S RULING DESPITE THE EXISTENCE OF FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The standard of review for summary judgment orders is well known. Summary judgment is appropriate "if the pleadings, depositions . . . and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Hartley*

v. State, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). On review, the appellate court places itself in the position of a trial court, assuming all facts most favorable to the nonmoving party. *Del Guzzi Const. Co. v. Global Northwest Ltd.*, 105 Wn.2d 878, 882, 719 P.2d 120 (1986).

In the proceedings below, the trial court granted summary judgment in favor of Harris and entered an order granting summary judgment. (CP 344). Nevertheless, Harris argues that the summary judgment standard of review is inapplicable in this case because the court also entered findings of fact and conclusions of law. Harris claims that this court must ignore the summary judgment order and submit the findings and conclusions to the deferential "substantial evidence" standard of review. This position is misguided. Under no circumstances can the trial court or the parties undermine the appellate court's summary judgment standard of review.

1. Findings and Conclusions Entered with a Summary Judgment Order are Superfluous and Must be Disregarded.

Harris' reliance on the trial court's findings of fact and conclusions of law are misplaced. Washington courts repeatedly have emphasized that findings of fact and conclusions of law entered in the course of a summary judgment are superfluous and cannot be considered on appeal. *See, e.g., Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978); *Donald v. City of Vancouver*, 43 Wn. App. 880, 883, 719 P.2d 966 (1986); *Dodd v. Gregory*, 34 Wn. App. 638, 641, 663 P.2d 161 (1983).

Similarly, the failure to assign error to summary judgment findings and conclusions has no effect on the case. *See, e.g., Chelan County Deputy Sheriffs' Assoc. v. County of Chelan*, 109 Wn.2d 282, 294 n.6, 745 P.2d 1 (1987); *Washington Optometric Assoc., Inc. v. County of Pierce*, 73 Wn.2d 445, 448, 438 P.2d 861 (1968). As a result, findings and conclusions do not affect the standard for reviewing summary judgment orders. *See Sheriffs' Assoc.*, 109 Wn.2d at 294.[1]

The rationale behind this rule is apparent. The moving party's burden in a summary judgment proceeding is to prove by *uncontroverted* facts that he is entitled to judgment as a matter of law. By definition, summary judgment is not appropriate if the trial court must "find" facts in order to support the ruling. The court in *Duckworth* aptly summarized this position:

> The function of a summary judgment proceeding is to *determine whether a genuine issue of material fact exists.* It is *not,* as appears to have happened here, *to resolve issues of fact or to arrive at conclusions based thereon.*

91 Wn.2d at 21 (emphasis in original). *See also State ex rel. Zempel v. Twitchell*, 59 Wn.2d 419, 425, 367 P.2d 985 (1962) ("The function of a summary judgment proceeding . . . is to determine whether or not a genuine issue of fact exists, not to determine issues of fact").

In this case, the trial court improperly (or at least needlessly) entered findings of fact and conclusions of

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[1] Despite her sweeping arguments, Harris has produced no authority to support her position that findings and conclusions can be considered in a summary judgment appeal.

law along with its summary judgment order. Because the case was decided on summary judgment, these findings and conclusions have no weight on appeal. This court's only function is to judge the trial court's decision under the summary judgment standard of review - determining whether either party is entitled to judgment as a matter of law based on uncontroverted facts.

2. The Parties' Alleged Stipulation Does Not Affect the Summary Judgment Standard of Review.

Harris claims that Ski Park's attorney entered into stipulations that somehow validated the findings of fact and conclusions of law, thereby compelling a substantial evidence standard of review. This argument must be rejected for two reasons. First, the trial court transcript does not support Harris' stipulation claim. Second, even if the parties made such a stipulation, the law of summary judgment would render it meaningless.

a. Evidence of Stipulation

Harris' "evidence" of a stipulation is limited at best. Her appellate brief quotes three exchanges between the court and the two attorneys: Ski Park's attorney stating that all factual data had been presented to the court (RP 96), Harris' attorney stating that all material facts were before the court (RP 97), and Ski Park's attorney stating that the facts were not in dispute (PR 99). The brief also quotes the court's statement that he would not have granted summary judgment but for the representations

that all material facts had been submitted. (RP 108). Based on these passages, Harris claims the parties stipulated that (1) all material facts had been presented to the court, and (2) the facts were not in dispute.

CR 2A states that stipulations are binding on the parties only if "made and assented to in open court." This implies some clear, unambiguous and certain statement to the court setting forth the specific matters subject to the stipulation and expressly acknowledging the stipulation. The record in this case, however, hardly constitutes a firm and definite acknowledgment. The Ski Park trial attorney simply made two short responses to questions from the court in the course of his argument. He did not delineate the scope or nature of the alleged stipulations, nor were any "formalities" recognized. Under these circumstances, fairness dictates that mere passing comments not be elevated to the level of formal stipulations.

b. Stipulations and Summary Judgment

Even if Ski Park made the alleged stipulations, the nature of summary judgment proceedings preclude them from having any impact on the efficacy of the court's findings and conclusions or on the standard of review. The alleged stipulation that all material facts were before the court seems to be the more important stipulation from the court's standpoint. In granting summary judgment, the court expressly "relied upon the representations of both counsel that all the material facts in this case are before the Court." (RP 108).

Despite the court's reliance, this alleged stipulation is meaningless in a summary judgment context. Assumably, all material facts are presented to the court in *every* summary judgment motion – the attorneys have an obligation to do so. The fact that the court has considered all material facts has no bearing on whether a genuine issue of material fact exists. In addition, the fact that some material fact has not been presented does not preclude summary judgment. The court's only obligation is to make the summary judgment determination based on the pleadings, affidavits, and other materials submitted to him. Therefore, the alleged stipulation necessarily could have no effect on the court's ruling.

The nature of summary judgment motions also renders ineffective the alleged stipulation that the facts were undisputed. This alleged stipulation is meaningless for three primary reasons. First, even if both parties stated that the material facts were undisputed, they did not agree on which facts were material. Unless the motion is frivolous, *every* attorney bringing a summary judgment motion must argue and believe that the material facts are not in dispute. Such an argument suggests only that the facts material to *that party's* motion are undisputed. It does not constitute an agreement that the facts material to the opposing party's cross-motion for summary judgment also are undisputed. The parties may simply disagree as to which facts are material.

The positions of the parties in this case constitute a classic example of this principle. Both parties agree that the "operative" facts – transactions, dates, and documents – are undisputed. Beyond these basic facts, Ski

Park believes that the only key material fact is Winkelman's fee ownership of the right of way property. That fact alone indicates that Winkelman excepted a fee interest in the right of way in the deed to Harris. Conversely, Harris relies on a long list of material facts to support her position. As a result, Ski Park's argument that the material facts are undisputed refers only to *its* understanding of the facts that are material, not to Harris' material facts.

Second, and along the same lines, the alleged stipulation is meaningless because the parties did not identify the specific facts to which they were stipulating. In the typical case, the parties actually prepare a detailed stipulation of facts, which a trial court then adopts as part of its summary judgment ruling. No findings of fact are required. In this case, however, some of the facts were controverted despite the parties alleged stipulation. As a result, the court actually was forced to resolve factual issues and execute findings of fact. This violated the principles of summary judgment law stated above, and therefore renders ineffective the alleged attempted stipulation.

Harris would have had a valid argument if Ski Park had stipulated to the validity of the findings of fact and conclusions of law themselves. However, Ski Park did not do so. At the most, it agreed only that "the facts are not in dispute." (CP 99).

Finally, Harris' argument must fail because as a matter of law, the parties cannot enter into a general stipulation that no material issues of fact exist for summary judgment purposes. The determination as to genuine

issues of fact in a summary judgment context is a question of law for the trial court. The well-settled rule is that the parties' stipulation is not dispositive as to legal issues. *See, e.g., Folsom v. County of Spokane,* 111 Wn.2d 256, 262-63, 759 P.2d 1196 (1988); *Rusan's, Inc. v. State,* 78 Wn.2d 601, 606, 478 P.2d 724 (1970). Once again, the parties could have prepared a stipulation of facts for the court to adopt. However, by simply "agreeing" that no material issues of fact existed the parties improperly invaded the province of the trial court.

All three of these arguments are closely related to the rules concerning the summary judgment standard of review discussed above. The courts will not stray from the principle that summary judgment can only be based on uncontroverted material facts. On review, the trial court's attempt to resolve factual issues or to support its holding with findings of fact and conclusions of law automatically are disregarded. The appellate court's only function is to examine the evidence before the trial court, determine whether genuine issues of material fact exist, and determine whether either party is entitled to judgment as a matter of law based on undisputed material facts.

B. THE TRIAL COURT IMPROPERLY RELIED ON "FULL BLOWN" EXTRINSIC EVIDENCE AND ON THE MERGED LANGUAGE OF THE EARNEST MONEY AGREEMENT.

Although Harris' brief rambles on for several pages, she simply restates the same argument over and over –

that the deed language is ambiguous and must be construed in her favor. This argument is ineffective, however, because Harris improperly relies on "full blown" extrinsic evidence (i.e., affidavits and declarations) in an attempt to create an ambiguity. Because the deed language read in conjunction with the surrounding circumstances is not ambiguous, use of parol evidence to create an ambiguity is inappropriate.

Similarly, Harris' attempt to use the language of the earnest money agreement to create an ambiguity in the deed language is misguided. The merger doctrine expressly excludes evidence of prior agreements in deed interpretation cases.

1. Reliance on Affidavits and Similar Extrinsic Evidence is Inappropriate Because the Surrounding Circumstances Eliminate any Ambiguity in the Deed Language.

Analyzing Harris' position requires an understanding of the proper use of extrinsic evidence in deed construction cases. In construing deed language (and other contract language), courts essentially have developed a three-stage approach. First, the court looks to the language of the deed standing alone in order to ascertain the intent of the parties. If the language itself is unambiguous, the analysis stops and the court gives effect to that language. If not, the court may consider extrinsic evidence. *See Roeder Co. v. Burlington Northern, Inc.*, 105 Wn.2d 269, 276, 714 P.2d 1170 (1986).

Analysis of the cases indicate that the consideration of extrinsic evidence involves two additional stages. In

the second stage, the court will consider "limited" extrinsic evidence in order to understand "the situation and circumstances of the parties existing at the time of the grant." *Zobrist v. Culp*, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981); *Queen City Savings & Loan Assoc. v. Mecham*, 14 Wn. App. 470, 474-75, 543 P.2d 355 (1975). In this case, such evidence includes the location of the various parcels, the basic facts surrounding the sale transaction, the right of way abandonment and reversion to Winkelman, the size of Harris' parcel in relation to the size of the property she is attempting to claim, and Harris' opposition to the Rails-to-Trails project. Such evidence allows the trial court to get a "feel" for the circumstances surrounding the transaction. As with the first stage, if the deed language is unambiguous when read in the context of the surrounding circumstances, the court's analysis ends and it must enforce the language as written.

The third stage is the interpretation of "full blown" parol evidence. The court reaches this stage only if it cannot interpret the deed as a matter of law based on the language and the surrounding circumstances. This parol evidence is *not* automatically considered simply because the language remains ambiguous after stage one.

In this case, the trial court relied on affidavits and similar extrinsic evidence to create an ambiguity in the deed. Under a proper analysis, however, the court should have stopped after stage two and should not have considered full blown extrinsic evidence. Evidence of the circumstances surrounding the transaction, most importantly Winkelman's fee ownership in the right of way, eliminated any ambiguity in the deed language standing alone. (The full discussion supporting this conclusion is presented in Ski Park's prior brief

and will not be repeated here.) As a result, affidavits and related evidence could not be used to create an ambiguity where none existed.

Significantly, summary judgment is still inappropriate even if the trial court properly considered "stage three" evidence. The affidavits conflicted on several key issues, such as Winkelman's intent. In addition, the trial court drew several inferences in favor of Harris to support his ruling when he was required to read the affidavits in the light most favorable to Ski Park. In short, if Ski Park is not entitled to judgment as a matter of law based on the deed language and the surrounding circumstances, this case must be remanded for a trial to resolve the factual issues created by the full blown extrinsic evidence.

2. The Merger Doctrine Precludes the Trial Court's Reliance on the Earnest Money Agreement.

Both parties concede that the language of the deed exception clause differs from the language of the same clause in the prior earnest money agreement: the earnest money agreement refers to "right of way *easement*" while the deed refers to "right of way". Harris repeatedly argues that the language of the earnest money agreement should control over the deed language, and the trial court essentially reformed the deed language based on that argument.[2] This argument must be rejected, however, because it violates the well-settled merger doctrine.

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[2] Harris strenuously denies that the trial court reformed the deed, and the court's order as executed does not mention reformation. It is interesting to note, however, that both parties

The general rule in Washington is that the provisions of a real estate contract and sale agreement and all other prior negotiations and agreements merge into a deed made in execution of the contract of sale. *See, e.g., Black v. Evergreen Land Developers, Inc.*, 75 Wn.2d 241, 248, 450 P.2d 470 (1969). The entire purpose of the doctrine is to provide finality, recognizing that the understandings and agreements between the parties may change in the course of negotiations. *See Snyder v. Roberts*, 45 Wn.2d 865, 871, 278 P.2d 348 (1955). Under this doctrine, an agreement that is superseded by a subsequent agreement cannot be used to vary the terms of the final agreement.

Harris argues that an exception applies, citing the proposition that separate deeds or instruments may be construed as one instrument when executed as parts of substantially one transaction. *See Standring v. Mooney*, 14 Wn.2d 220, 227, 127 P.2d 401 (1942). This argument misconstrues *Standring*. The exception clearly applies only to *independent* instruments relating to one transaction, such as the deed, note, and mortgage in the *Standring* case. No Washington case suggests that the exception applies when a subsequent agreement (i.e., a deed) *supersedes* a prior agreement (i.e., a purchase and sale agreement). Unless the law barred the use of superseded agreements to vary the terms of subsequent agreements, the merger doctrine would be meaningless.

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clearly understood the court to be reforming the deed. Harris' counsel even inserted reformation language in preparing the findings of fact and conclusions of law. The trial court substantially modified the findings and conclusions to indicate that he was "resolving an ambiguity" rather than reforming the deed, but his actions speak louder than his words.

Even if the merger doctrine is inapplicable in this case, Harris' reliance on the earnest money agreement is curious. While the earnest money agreement referred to a "right of way easement", the deed specifically *omitted* the easement language. This clearly implies that the parties intended to except the right of way property itself, and not simply an easement in that property.

III. CONCLUSION

Ski Park's prior brief established that the Winkelman deed unambiguously reserved the fee interest in the right of way property. Because Winkelman owned the right of way property in fee at the time of the conveyance, any other interpretation would render the deed exception meaningless and nonsensical. (Appellant's Brief at 17-22).

The discussion above demonstrates that Harris' two-pronged attack on Ski Park's position is ineffective. First, the summary judgment standard of review is applicable on this appeal. Although the trial court entered findings of fact and conclusions of law, these are superfluous in summary judgment proceedings and must be disregarded. Similarly, the parties' alleged stipulation that no genuine issue of fact existed could not alter the standard of review because of the very nature of summary judgment proceedings.

Second, Harris cannot create an ambiguity by the use of "full blown" extrinsic evidence or the earnest money agreement. The deed language becomes unambiguous when interpreted in light of the surrounding circumstances. Therefore, it is improper to consider "stage three" extrinsic evidence such as affidavits to create an

ambiguity. Likewise, the earnest money agreement cannot be considered because it merged into the executed deed.

For the reasons stated in Ski Park's prior brief and in this reply brief, appellant Ski Park Farms respectfully requests that this Court reverse the trial court's summary judgment order and grant judgment in favor of Ski Park as a matter of law. In the alternative, Ski Park requests that this court remand this case to the trial court for resolution of remaining factual issues at trial.

RESPECTFULLY SUBMITTED this 23 day of June, 1989.

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